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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1964

184

No. [redacted]

BENEFICIAL FINANCE CO. OF NORTH JERSEY,
Petitioner,

vs.

IRWIN RAY, As Trustee under Reorganization Proceedings of ATLAS SEWING CENTERS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM GRESHAM WARD
Attorney for Petitioner, Beneficial Finance Co. of North Jersey
1240 duPont Building
Miami, Florida 33131

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106 HArrison 1-3030

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 19....

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IRWIN RAY, As Trustee under Reorganization Proceedings of ATLAS SEWING CENTERS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO the HONORABLE EARL C. WARREN, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States.

The petitioner, BENEFICIAL FINANCE CO. OF NORTH JERSEY, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on February 17, 1964, petition for rehearing denied March 17, 1964, and judgment of the Court issued as and for the mandate, dated the 17th day of March, 1964.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Florida, dated the 14th day of December, 1962, is not reported, but is reproduced at Appendix "A", *infra*, p. A1, and is further reflected at pages 95 through 99, both inclusive, in the printed Transcript of the Record submitted herewith. The opinion of the Court of Appeals for the Fifth Circuit, dated February 17, 1964, is reported at 328 F.2d 55, and for the Court's convenience is reproduced at Appendix "B", *infra*, p. A5. The petition for rehearing was denied on the 17th day of March, 1964, reproduced at Appendix "C", *infra*, p. A9, and the judgment and mandate of the Court was entered on the 17th day of March, 1964.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on the 17th day of February, 1964, and recorded February 17, 1964, and copy thereof is appended to this petition at Appendix "B", *infra*, p. A7. The opinion of the Court is dated the 17th day of February, 1964. The petition for rehearing was timely filed and that petition for rehearing was denied on March 17, 1964, and final judgment of the Court and mandate was issued on the 17th day of March, 1964, all shown in the Appendix attached hereto and above referred to.

The petition is filed timely (Title 28 U.S.C., Sec. 2101 (c)). The jurisdiction of the Supreme Court of the United States is invoked under 11 U.S.C., Sec. 47(c), (30 Stat. 553 as amended), and Title 28 U.S.C. 1254 (1), (62 Stat. 928).

QUESTIONS PRESENTED

The United States District Court, Southern District of Florida, in Chapter X Reorganization Proceedings exercising summary jurisdiction, on petition of the trustee cancelled a sale and assignment of numerous retention title contracts, covering personal property which had been entered into and assignments made on or about January 27, 1961. Possession of the instruments and complete assignments and delivery had been made within a short time after January 27, 1961, by delivery from Miami, Florida, to Beneficial Finance Co. of North Jersey, Morristown, New Jersey, and in turn throughout various areas of the United States to offices or subsidiaries of the purchaser. Title was vested in Beneficial Finance Co. of North Jersey under a claim of title and ownership and purchase. These instruments or documents, in the nature of retention title contracts, had not been in the possession or control of the debtor corporation, Atlas Sewing Center, Inc., since February, 1961. Titles had been vested in Beneficial and payments of the purchase price on installment basis had been assigned by Atlas to Irving Trust Company of New York City, to whom all accountings were made on the purchase installment payments. Payments on the purchase price were paid, as aforesaid, to Irving Trust Company, which in turn applied those proceeds in reduction of the debt owed by Atlas to Irving Trust Company. Thus neither the documents themselves nor the proceeds of the sale to Beneficial resulting from the January 27, 1961, contract had been under the custody or control or direction of Atlas for approximately a year and four months prior to the time the corporation filed a reorganization petition under Chapter X on June 22, 1962.

On September 20, 1962, the trustee petitioned the Court under the provisions of Section 116, of Chapter X of the Act of Congress relating to Bankruptcy, to reject the sale of these retention title contracts under the transaction of January 27, 1961, on the theory that this was an executory contract.

Under date of September 21, 1962, the Court issued an order to show cause returnable on the 8th day of November, 1962, to require the Beneficial Finance Co. of North Jersey to show cause why the sales agreement should not be rejected as an executory contract.

The Irving Trust Company and numerous other banks which were parties to the original loan agreements were also named as parties defendant. No question was raised that the contracts were other than sales contracts or that title had not passed to Beneficial. The only question raised was that the Court, because all of the purchase price had not been paid in full, determined that the contracts were executory and therefore were subject to cancellation.

Beneficial Finance Co. of North Jersey by a written motion objected to the summary jurisdiction of the United States District Court, Southern District of Florida, in the Chapter X proceedings, setting forth that the claims of the trustee on the face of the record and the exhibits referred to showed that Beneficial was holding the possession as the purchaser of thousands of accounts which were represented by retention title contracts for the sale of sewing machines and other articles of personal property; that it had liquidated many of those accounts with full exercise of title and had paid large sums of money on the purchase price to Irving Trust Company, as set forth in the basic contracts; that there was an actual adverse claim of title; that the title was not merely colorable, but was real; that the contracts in question were not executory just because

the full purchase price had not been paid when there were no grounds for cancellation claimed such as default in purchase price.

The District Judge denied the motion as to summary jurisdiction, entertained the petition in the summary proceeding, ordered that the relationship under the sales contracts between Atlas, the debtor, and the purchaser, Beneficial, was that of an executory contract and that the purchaser had not fully paid for the assignments and transfers of the titles. On that ground, and that ground alone, the Court cancelled the contract in the said summary proceeding, making no provision for protection of Beneficial.

An appeal was filed by Beneficial to the United States Court of Appeals, Fifth Circuit. By the opinion of the said Court that Court ruled that the written documents under which the conditional sales contracts had been transferred to the appellant, now your petitioner Beneficial, constituted Beneficial only an agent for the collection of the contracts. The Appellate Court did not confirm the basis upon which the lower Court had ruled and did not approve or disapprove any order of the lower Court, but simply held that the lower Court did not err in entering a summary turnover because it appeared to it that although Beneficial had obtained possession of the property it did not have any claim of title that was more than colorable.

In the proceedings in the lower Court and in the United States Court of Appeals, Fifth Circuit, and in the petition for rehearing it was claimed by Beneficial that such proceedings in the nature of summary proceedings were not allowable and that these proceedings conflicted with the controlling opinion laid down by the Supreme Court of the United States in the case of *Cline* v. *Kaplan*, 323 U.S. 97, 65 S. Ct. 155, 89 L. Ed. 97, and that a decision of this type was also in conflict with other decisions of other United States Courts of Appeals.

STATUTES INVOLVED

(1) Section 23 of the Bankruptcy Act, 11 U.S.C., Section 46(b), provides:

> "Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act."

(Note: Section 60 of the National Bankruptcy Act, 11 U.S.C., Section 96, is the "Preference Statute" and is not applicable to the facts as presented in this record.)

(2) The next section referred to is Section 67 of the Bankruptcy Act, 11 U.S.C., Section 107, which applies to fraudulent transfers and liens, which has no application under the record in this case.

(3) Under Section 70 of the Bankruptcy Act, 11 U.S.C., Section 110, designating the property rights and title which is vested in the trustee, the statute provides in sub-paragraph 8:

> "* * * property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this Act, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court."

The provision of Section 102 of the National Bankruptcy Act, which is applicable to Chapter X reorganization proceedings, specifically provides that Section 23 is not applicable to Chapter X proceedings.

Section 2, sub-paragraph 21, might have some relationship or be applicable even in Chapter X proceedings if there had been a sufficient finding of fact in the lower Court. This statute, covering the general powers granted to courts of bankruptcy, is as follows:

> "Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this Act, * * * *Provided, however*, That such delivery and accounting shall not be required except in proceedings under section 77 and chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy."

(4) The only section of the United States Statutes referred to in the United States District Court as authority for the summary proceeding is Section 116 of the National Bankruptcy Act, 11 U.S.C., Sections 511-521, paragraph 1, which is as follows:

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the court—
>
> (1) permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate."

STATEMENT

Atlas Sewing Centers, Inc., a Delaware corporation, filed a petition for reorganization under Chapter X of the National Bankruptcy Act on June 22, 1962, in the United States District Court in and for the Southern District of Florida, Miami Division (see Transcript of Record, page 3). In the list of liabilities set forth in Schedule "A" (Tr. pp. 8, 9) the debtor listed notes payable to banks and senior creditors in the amount of $11,796,546.00. Reference is made to Note 2 reflected on page 9 of the Transcript, that these notes to the banks, payable to Irving Trust Company, as agent under the agreement of November 9, 1960, were secured by $9,566,624.00 of accounts receivable.

On September 21, 1962, the Trustee filed a petition in the United States District Court (see Tr. 70) naming as respondents Beneficial Finance Co. of North Jersey, Morristown, New Jersey, Irving Trust Company, New York, New York, and numerous other banks as participants, and as reflected on page 71 of the Transcript, paragraph "2" of the petition set forth:

> "This Court has jurisdiction of your petitioner and the parties hereto by virtue of Section 116(1) of Chapter X of the Act of Congress relating to bankruptcy."

The petition further alleged (Tr. 76), and we quote:

> "* * * that on January 27th, 1961, Atlas entered into an agreement, designated 'Master Agreement No. 1', with Beneficial whereby Atlas assigned in bulk to Beneficial all notes, chattel mortgages, conditional sale agreements and other obligations generated from

the sales by Atlas of personal property. The consideration to be paid by Beneficial to Atlas for the assignment in bulk of the notes, chattel mortgages and conditional sale agreements is 75% of the actual collections made on said obligations. Beneficial, for services allegedly rendered, pursuant to the terms of Master Agreement No. 1, retains as remuneration 25% of all collections made. Proceeds of collections made pursuant to said Master Agreement No. 1 are to be remitted by Beneficial to the Agent. A copy of Master Agreement No. 1 is attached to this petition and made a part hereof as though fully set out herein, marked Exhibit A; a copy of the Assignment in Bulk referred to herein is attached hereto and made a part hereof as though fully set out herein, marked Exhibit B."

Then in the accounting set forth in the petition (Tr. 77) it was alleged that in February, 1961, Atlas had assigned to Beneficial original face amount of receivables of $20,717,520.96; that it had received credit for collections through May 31, 1962, under the contract of $5,530,039.84; that there had been returned and charged off uncollectible accounts through May 31, 1962, of $6,029,836.32, leaving a face amount of collateral assigned or sold to Beneficial, as the case may be, of $9,157,644.80.

It is further reflected in the petition of the Trustee (see Tr. 78) that Beneficial out of the collections of $5,530,039.84 had paid to Irving Trust Company, pursuant to the agreement, $4,095,722.89. The Trustee contended (see Tr. 80, reference to paragraph 12 of the petition) that under the agreement of January 27, 1961, whereby Atlas assigned and delivered to Beneficial all of the customer accounts of Atlas, that Atlas' contact with its customers had been lost, and we quote:

"The loss of customer contracts by Atlas is detrimental to the business of Atlas in that the economic success and feasibility of Atlas depends upon its ability to

continue retail sales of appliances and equipment, which of its nature necessitates continued customer contacts by salesmen and collection agents of Atlas. The contacts made by Atlas personnel is utilized by Atlas to generate future sales of its merchandise and inventory and to obtain additional customer leads."

Paragraph 13 of the petition alleges (see Tr. 80, 81), and we quote:

"The facilities of Atlas under the operation of the Trustee are adequate to effectuate collection of all paper presently in the hands of Beneficial and, in addition, collection can be made at less expense to Atlas than under the executory contract with Beneficial, dated January 27th, 1961."

The petition further asks that the Court, pursuant to Section 116 of Chapter X of the Act of Congress relating to bankruptcy, permit the rejection of the contract as being an executory contract and require that Beneficial return all of the contracts, agreements, mortgages, notes and customer paper which were presently held by Beneficial. There was no claim of any agency relationship.

A rule to show cause (see Tr. 82) was issued by the United States District Judge under date of September 21, 1962, and among other things it was ordered (Tr. 83):

"Ordered that on the 8 day of November, 1962, at 2 o'clock P. M. Federal Building, Miami, Florida, before the undersigned Judge, a hearing shall be conducted upon the Trustee's petition for the rejection of an executory contract by and between Atlas Sewing Centers, Inc., and its subsidiaries, and Beneficial Finance Company."

On the 8th day of November, 1962 (see Tr. 94), Beneficial Finance Co. of North Jersey filed before the Court a written motion to strike the petition of Irwin Ray to reject executory contract, in which it was set forth that the Court

did not have jurisdiction; that the contract was no longer executory, but was an executory sale and that title to the notes and documents had passed to Beneficial and that, therefore, the claimed jurisdiction under Section 116.1 of the Bankruptcy Act was inapplicable. The motion (see Tr. 95) further raised the question that the Court had no right to proceed in a summary proceeding.

On December 14, 1962, the United States District Judge, Hon. Emett C. Choate, entered an order shown in the Transcript of Record, pages 95 through 99, both inclusive. A copy of this order is attached to this petition as Appendix "A". In this order as reflected in the Transcript of Record, on page 98, the Court based its order upon the following statement, and we quote:

> "* * * it appearing to the Court that the contract by and between the debtors is executory and burdensome to the estate of the debtors."

and then followed certain orders directing Irwin Ray, as Trustee, to reject the contracts between the debtors and Beneficial Finance Co. of North Jersey, dated the 27th day of January, 1961; denying the motion to dismiss filed by Beneficial; directing that the Beneficial Finance Co. of North Jersey account to Irwin Ray, as Trustee, for all moneys collected; directing that Beneficial Finance Co. of North Jersey return or turn over to the Trustee all customer ledger cards, contracts, agreements, mortgages, notes and customer paper of any and all description, held presently by Beneficial Finance Co. of North Jersey; and further directing that the Trustee embark upon the collection of these accounts receivable, contracts, agreements, mortgages, notes and customer paper, and upon the collection of any moneys to maintain and keep separate accounts for the receipt of those funds from those contracts.

Notice of appeal was filed on December 20, 1962, which resulted in the entry of the order and opinion by the United States Court of Appeals, Fifth Circuit, dated February 17, 1962, a copy of which is attached to this petition as Appendix "B". A copy of the judgment of the United States Court of Appeals, Fifth Circuit, dated February 17, 1964, is attached as Appendix "B". A copy of the order denying the petition for rehearing, dated March 17, 1964, is attached as Appendix "C".

A petition for rehearing was immediately filed by Beneficial and is shown in Transcript of the Record, at page 276.

In the preparation of the first record it appeared that the Clerk had omitted copies of the contracts in question and this was corrected by order of the Court dated January 15, 1963 (Tr. 146). Photostatic copies of the contract exhibits were authorized to be made and sent to the Clerk as part of the certification, together with testimony of the proceedings in the hearing of November 8, 1962. This supplemental record as prepared and forwarded at the direction of Beneficial is shown beginning at page 151 of the certified printed record. The Master Agreement No. 1, which was signed by Atlas Sewing Centers, Inc., and accepted by Beneficial, is shown at page 151, as follows:

> "1. General. We desire to sell you or to such one or more of your affiliated corporations or associated companies as you may designate, for the purposes agreed upon, all of our notes, chattel mortgages, conditional sale agreements, and other obligations arising out of the sale of personal property (all herein called 'notes'). Any of your affiliated corporations or associated companies taking an assignment of any notes pursuant to this agreement shall have any and all rights under this agreement pertaining to such notes and any reference to you in this agreement shall be deemed to

include any such affiliate or associate who is an assignee of any of such notes. Such sales and assignments of such notes shall be made under an assignment form headed 'Assignment in Bulk' which shall be substantially in the form attached hereto as Exhibit A and made part hereof. The terms and conditions of this agreement shall be considered a part of each such assignment as completely as though set forth therein. Except to the extent provided in the Master Agreement any assignment of any note hereunder shall be without recourse, unless it is stated in such assignment that such transfer is made with recourse."

Paragraph 2 (Tr. 152) designated the purchase price. Paragraph 4 (Tr. 153) contained this warranty:

> "We represent and warrant that any note sold to you will have resulted from the sale of our own property. We further represent and warrant that any merchandise covered by said notes shall have been unconditionally accepted by the debtors and that at the time of the assignment of any note by us to you the merchandise will be in the possession of the debtor and will be the identical merchandise described in the note. * * * You shall have the sole and unrestricted right to make any compromise or settlement whatsoever with any debtor in any case, including without limitation, where the amount due upon any note is in dispute or where claims are made for allowances or discounts upon merchandise, and you shall have no liability to us by reason thereof."

Paragraph 6 (Tr. 154) provided for reassignment and redelivery of any of the notes without recourse, under conditions set forth therein. We have only briefly summarized this agreement merely to show that this contract provided for an outright sale and delivery of title and possession of the notes in question to Beneficial.

Exhibit B (Tr. 157) shows the complete assignment in bulk by Atlas Sewing Centers, Inc., in which Atlas Sew-

ing Centers, Inc., sell, assign and transfer to Beneficial, its successors and assigns, all of their right, title and interest in and to the notes, chattel mortgages, conditional sale agreements, or other obligations, listed in Schedule "A" attached and made a part thereof, and the personal property referred to therein and security therefor, including any insurance policies.

The testimony given at the hearing of November 8, 1962, before the District Judge, insofar as it relates to this transaction is shown beginning at page 166 of the Transcript. It was pointed out on that page and succeeding pages that the claim was made by Beneficial through its attorneys and also by the attorneys for Irving Trust Company, that the claim was made that these assignments of notes had been completed by delivery and passage of title; that about $20,000,000.00 in face value of consumers notes had been sold to Beneficial. Remittance were made directly to Irving Trust Company as agent for the various banks. On behalf of the Irving Trust Company, as agent for the other banks, their attorney, Mr. Guthrie, pointed out (Tr. 173) that the banks had a claim against the debtor corporation for approximately $11,000,000.00 and that the face amount of these notes remaining which were assigned to Beneficial was only approximately $8,000,000.00. Mr. Guthrie then pointed out (Tr. 177) that some eighty thousand customers were involved in these notes. He further pointed out (Tr. 179) that as far as Beneficial was concerned there were five hundred separate offices of Beneficial throughout the country, all of which were engaged in prosecuting the collection of these accounts which had been assigned to Beneficial. The Court remarked (Tr. 179):

"The Court:

We find that Beneficial is very uninterested in our affairs. They have other business, as you know.

Mr. Guthrie:

These are the problems.

I may state our position, the position of the institutions must be to oppose this application, and appellant's motion.

I think we should file our objection to the jurisdiction of the Court."

Then Mr. Guthrie pointed out (Tr. 180):

"Mr. Guthrie:

We have this situation: The trustee here comes into Court and seeks to set aside an executory contract which the debtor, Atlas, had with Beneficial. The trustee gives notice to the banks and insurance companies, and he puts in as an exhibit, Exhibit C, a copy of the note for $13 million which Atlas signed evidencing the obligation it had to these institutions.

However, it fails to include another contract made the same day, January 27, 1961, which we have as Exhibit X to this answer.

This contract which is between Atlas and the Institutions, actually is Atlas and the majority holders representing the Institutions.

This contract, expressly by its terms, gives us a lien on the paper held by Beneficial.

It furthermore, in conjunction with the second contract, refers to this, which is between the Institutions and Beneficial, where it says the arrangement will not be changed without the consent of the Institutions.

Here you have a situation in which bank creditors after debtors have a lien on property, and in a proceeding under Section 116(1) of the Bankruptcy Act, the trustee purports to set aside—that is the only proceeding—to set aside a contract as executory.

Certainly, this is not an executory contract.

We find, actually, no case in the books at all which the trustee has sought to set aside a security arrangement on the ground it was executory."

The opinion of the lower Court is predicated solely upon the fact that because Beneficial had not fully completed the purchase price and still had thousands of these accounts in its possession, with assignments made to over five hundred different agencies or subsidiaries of Beneficial, the trustee had a right to cancel the sale of these notes, thus affecting the rights not only of Beneficial as the purchaser, but the rights of the banks which were parties to the contract as security for their position.

The effect of that order was to not only cancel the rights of Beneficial which had been operating under this contract for approximately eighteen months, but also upset the solemn agreement with the banks which had a secured position on the assignment of the payments. The merits of the transaction were not determined in the lower Court. There is no actual finding of fact based upon any testimony that Beneficial was in fact an agent or that its claim to the notes which were in its possession and which had been legally assigned to it was merely colorable and without any *bona fide* contention of title. The decision of the United States Court of Appeals for the Fifth Circuit did not affirm or disaffirm the findings of the lower Court as to the fact that this was an executory contract, but apparently the Court conducted a trial *de novo* and held without any prior determination of the issue in the lower Court that the contracts were nothing but agency contracts and were apparently subject to cancellation at the mere option of the trustee, without even giving consideration to the fact that if there was an agency it could have been an agency coupled with an interest which was not subject to revocation in a mere summary proceeding.

In this respect and to show the inconsistency, there was included in the Transcript of the Record, page 45, a similar type of agreement which Atlas Sewing Centers had entered into with Brother International Corp., in which identically the same procedure was used, the same covenants were contained and in which the assignment (Tr. 47) contained this language:

> "2. Agree that all proceeds, claims or transactions of any kind whatsoever are the undisputed property of Brother International Corporation and that against the above Atlas holds no claim for offset of any nature or description whatsoever."

This type of contract was upheld by the same Judge who entered a contrary order against Beneficial. The merits of the claims of Beneficial were not determined by any plenary action. The Appellate Court did not uphold Judge Emett C. Choate's order in the District Court that this contract was an executory contract, but the whole matter was disposed of by the Appellate Court by its exercise of summary jurisdiction *de novo* without any factual basis to support its finding that it, Beneficial, had no adverse claim of title to the contract that was more than colorable.

REASONS FOR GRANTING THE WRIT

I.

The United States Court of Appeals for the Fifth Circuit has decided an important federal question in a way which conflicts with the decision of this Court in the case of Cline v. Kaplan, 323 U. S. 97, 65 S. Ct. 155, 89 L. Ed. 97.

In said case an involuntary petition for adjudication in bankruptcy was filed against Gold Medal Laundries on September 22, 1941. A month later the adjudication was

made. On December 22 the petitioner, the trustee in bankruptcy, filed with the Referee a petition for an order directing the respondents to turn over certain assets allegedly belonging to the bankrupt which had come into the possession of the respondents some fifteen months prior to the institution of the bankruptcy proceedings. Respondents' answer claimed ownership in themselves and prayed dismissal of the petition. Extensive hearings were held to determine whether the property was in the constructive possession of the bankrupt. Prior to the close of the hearing respondents orally moved that the petition be dismissed for want of summary jurisdiction and a formal motion to this effect was filed on May 19, 1942. On June 24, 1942, the Referee granted this motion. The District Court reversed, whereupon the Referee denied a turnover order on the merits and the District Court again reversed. Appeals from both decisions of the District Court were taken to the Circuit Court of Appeals for the Seventh Circuit. This Court pointed out (see text, page 156, of 65 S. Ct.):

> "Having found that the objection to the summary jurisdiction had been timely and had not been waived, that court sustained the referee's dismissal for lack of jurisdiction. 142 F. 2d 301. Conflicting views having been expressed in different circuits on matters affecting bankruptcy administration which ought not to be left in doubt, we granted certiorari. 323 U. S. 691, 65 S. Ct. 67."

Then this Court pointed out (see text, page 156):

> "A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 481, 60 S. Ct. 628, 629, 84 L. Ed. 876. If the property is not in the court's possession and a third person as-

serts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto.' Galbraith v. Vallely, 256 U. S. 46, 50, 41 S. Ct. 415, 416, 65 L. Ed. 823; Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 44 S. Ct. 396, 68 L. Ed. 770. But the mere assertion of an adverse claim does not oust a court of bankruptcy of its jurisdiction. Harrison v. Chamberlin, 271 U. S. 191, 194, 46 S. Ct. 467, 468, 70 L. Ed. 897. It has both the power and the duty to examine a claim adverse to the bankrupt estate to the extent of ascertaining whether the claim is ingenuous and substantial. Louisville Trust Co. v. Comingor, 184 U. S. 18, 25, 26, 22 S. Ct. 293, 296, 46 L. Ed. 413. Once it is established that the claim is not colorable nor frivolous, the claimant has the right to have the merits of his claim passed on in a plenary suit and not summarily. Of such a claim the bankruptcy court cannot retain further jurisdiction unless the claimant consents to its adjudication in the bankruptcy court. MacDonald v. Plymouth County Trust Co., 286 U. S. 263, 52 S. Ct. 505, 76 L. Ed. 1093.

* * *

When the trustee filed his petition for a turnover order, respondents denied any basis for such an order and asserted their adverse claim. There is no dispute about that. Before the matter went to the referee for determination, respondents explicitly raised objection to the disposition of their claim by summary procedure. They later amplified that objection by a written motion and supported it by extended argument. The established practice based on the criteria of the Comingor case was thus entirely satisfied. We reject the suggestion that respondents conferred consent by participating in the hearing on the merits. See In re West Produce Corp., 2 Cir., 118 F.2d 274, 277. In view of the referee's opinion that the hearings were held to determine whether the bankrupt had constructive posses-

> sion of the property, the petitioner can hardly claim the benefit of the restricted rule which he invokes. In any event, such a view is contrary to that which was decided in Louisville Trust Co. v. Comingor, supra, which held, as we have noted, that consent is not given even though claimant 'participated in the proceedings' provided formal objection to a summary jurisdiction is made before entry of the final order. And the Comingor case 'has been repeatedly cited as determinative of the law and practice in similar cases.' Galbraith v. Vallely, 256 U. S. 46, 49, 41 S. Ct. 415, 416, 65 L. Ed. 823."

We respectfully contend that the opinion of the District Court of the Southern District of Florida and the opinion of the United States Court of Appeals for the Fifth Circuit in the case under review are dead in conflict with the principles of law enunciated by this Court. The Cline case involved ordinary bankruptcy. However, the United States Court of Appeals for the Fifth Circuit in the case of *United States* v. *Owens*, 329 F. 2d 678, March 16, 1964, held that a United States District Court sitting as a Chapter X Reorganization Court, did not have jurisdiction in a summary procedure where an adverse claimant was asserting more than a colorable claim thereto. The Court said, and we quote from the text at page 680:

> "All that need be shown by the United States to contest this sort of proceeding, we conclude, is that it was before the court asserting a bona fide and more than colorable claim to the $61,382.99. This Court has repeatedly said, as have all the other Courts to whom this subject has been addressed, that if property or funds are held in possession by third parties they are not subject to a summary turnover order by the Bankruptcy Court unless it 'clearly appears that possession was in or for the bankrupt, and the adverse claim or right is only colorable.

* * *

> In line with the undeviating policy as announced by this Court that where funds are not in the possession of the Bankruptcy Court and where the one having possession makes more than a colorable claim to such funds a summary turnover order may not bring them within the Court's jurisdiction for distribution, we conclude the judgment of the trial court must be reversed and the order set aside."

This opinion was rendered by the United States Court of Appeals for the Fifth Circuit on March 16, 1964, which was one day before the order denying the petition for rehearing was entered in this case.

II.

The United States Court of Appeals for the Fifth Circuit has decided an important federal question in a way which conflicts not only with the decision of this Court in the case of Cline v. Kaplan, 323 U. S. 97, 65 S. Ct. 155, 89 L. Ed. 97, but in proceeding to decide an important point of federal jurisdiction and summary procedure in bankruptcy without any prior determination of the same point by the lower Court, and is in conflict with the decision by the United States Court of Appeals for the Ninth Circuit, March 24, 1964, in the case of Irving Sulmeyer, Appellant, v. Arthur Donald Pfohlman, 329 F. 2d 915, and is also in conflict with the decision of the United States Court of Appeals, Second District, in the case of Cherno, Trustee in Bankruptcy, v. Engine Air Service, Inc., 330 F. 2d 191.

In the first case referred to above there was a bankruptcy proceeding involving residents of California. The referee overruled the objection of the wife of the bankrupt to the exercise of summary jurisdiction in determining whether the residence property was held in joint-tenancy or as community property. The referee also enjoined the

bankrupt and his wife and their attorneys, pending further order, from proceeding with a state action they had brought to determine title to this property. The wife petitioned the District Court to review the order of the referee. The wife also moved in the District Court for an order permitting the filing and prosecution of a state action to determine her homestead rights in the described property and for other relief. The District Judge sustained the objection of the wife of the bankrupt to the jurisdiction of the bankruptcy court to determine the status of the residence property in summary proceedings. The Court also concluded that the bankruptcy court was without jurisdiction to restrain the wife from proceeding with her state action. The order of the District Judge also dissolved the injunction or restraining order entered by the referee restraining the continuation of the state suit.

The trustee appealed to the United States Court of Appeals for the Ninth Circuit. He first argued that the referee's order was interlocutory and, therefore, not reviewable in a District Court. The Court disposed of that contention contrary to the trustee's argument. Then, the trustee argued on the merits that the District Court erred in determining that the bankruptcy court did not have summary jurisdiction to determine the extent of the bankrupt's interest in the property in question. In answer to this the Court said (see text, page 917):

> "One or the other of two elements must be present in order for the bankruptcy court to have summary jurisdiction to determine interests in property. Either the bankrupt must have had actual or constructive possession of the property at the time of the filing, or the claim asserted against the property must not have been 'substantial' and 'adverse.' Martoff v. Elliott, Trustee, 9 Cir., 326 F. 2d 204.

The referee neither found nor concluded that either of these elements were present. In his order it is recited only that 'good cause appearing therefor,' the objection of Lois E. Pfohlman to the summary jurisdiction of the referee 'be and the same is hereby overruled' and it is expressly found that this Court has summary jurisdiction to determine the matters set forth in the Trustee's said application; * * *.

The lack of findings and conclusions essential to sustain a determination that summary jurisdiction existed, warranted the reversal of the referee's order, whether or not that was the ground of reversal. Since the referee's order was properly reversed it is unnecessary to decide whether the district court was correct in determining that the bankruptcy court lacked summary jurisdiction. For if the bankruptcy court had such jurisdiction, it was not compelled to exercise it. It could, in the exercise of a sound discretion, permit the controversy to be determined in a plenary suit in the state court. In substance this is what the district court did and nothing in the record indicates to us that the court abused its discretion in so doing.

What is said above also disposes of the trustee's argument that the referee had jurisdiction to restrain Mrs. Pfohlman from proceeding with her state suit without obtaining permission from the referee.

The order is affirmed."

In the second case above referred to—the Cherno case—the United States Court of Appeals, Second Circuit, held:

"Bankruptcy court did not have summary jurisdiction to adjudicate title to security deposit held by landlord where such deposit was being held adversely to the bankrupt's estate under a good faith claim of right, and where landlord's postbankruptcy claim did

not constitute consent to summary adjudication of trustee's prebankruptcy claim predicated on a violation * * *."

In headnote 5 of that decision the following rule was laid down:

> "A claim is merely 'colorable' for purpose of resolving a claim of right in a summary proceeding over property held adversely to the bankrupt's estate if the claim on its face is made in bad faith and without any legal specification."

In the body of the opinion (text page 193 of 330 F. 2d), the Court said:

> "A claim is merely colorable if 'on its face made in bad faith and without any legal justification.' Harrison v. Chamberlin, supra, 271 U. S. at 194, 46 S. Ct. at 468, 70 L. Ed. 897. The landlord's claim to the deposit does not appear to be made in bad faith or to be devoid of any legal justification."

Beneficial was not a creditor of Atlas Sewing Centers, Inc. It had filed no claim in the estate. The notes had all been transferred with proper assignments and delivery of possession. The Master Contract No. 1 recited the full consideration and recited that title was transferred by sale. No bad faith is charged or shown. The claim asserted in response to the order to show cause in the summary proceeding on its face showed the complete passage and delivery of title and possession and actions thereon for about a year and six months. Summary proceedings do not restore the status quo.

III.

The United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of jurisdictional proceedings and has so far sanctioned such a departure by its own actions and by the District Court as to call for the exercise of this Court's power of supervision.

The question of summary jurisdiction of a Bankruptcy Court, and particularly a United States District Court sitting as a Chapter X Corporate Reorganization Court, is of the utmost importance if the economy of the United States is to be protected. In the commercial practice of today practically all of the states have adopted statutes which are more or less uniform in covering financing of accounts receivable and the sale and assignment of notes and conditional sales contracts.

In January, 1961, Atlas Sewing Centers, Inc., a corporation operating in Florida, had a perfect right to contract as long as the subject matter of the contract was not against public policy or was not otherwise prohibited by acts of the states or the federal government. The contract here in question was based upon the apparent standard and usage of this particular corporation. There is nothing shown or claimed in the record that the contract as entered into was contrary to public policy or contrary to any law. The actual sale by a company such as Atlas Sewing Centers of its conditional sales contracts and notes is one of the most common type of transactions known to the trade. If this contract is to be construed under the laws of Florida, then the Supreme Court of Florida in 1931 laid down the controlling rule in the case of *Bowling v. National Convoy & Trucking Co.*, 135 So. 541, wherein it is said:

> "Interest in continued existence of power or authority to act with reference to business, where secured

> by contract and based on consideration moving from agent to principal looking to exercise of power as means of reimbursement, creates 'agency coupled with an interest,' which is not, revocable and may in appropriate cases be enforced in equity."

In *Volume 28, A. L. R. 2d, at page 1263*, the authors have collected various cases which hold:

> "The vesting of legal title in a trustee is sufficient to support a claim of power coupled with an interest."

citing a United States case, *Fuller* v. *Peabody*, 6th Cir., 1 F. 2d 965; *Eisel* v. *Miller*, 8th Cir., 84 F. 2d 174, and cases from Alabama, Arkansas, Georgia, Illinois and numerous other states.

Prior thereto, in the same note, the authors refer to a question where there has been an assignment of the title to the subject matter, and it is said:

> "The clearest instance of a power coupled with an interest is where, as a part of the arrangement with his principal, the agent receives title to all or a part of the subject matter of the agency, as distinguished from title to all or a part of the proceeds of the agency."

See Section 3, on pages 1259 and 1260, with numerous cases cited.

A case which is nearly in point with the facts involved is a decision by the Washington Supreme Court in the case of *Dore* v. *Courlitz Valley Bank*. This case is referred to in the note in *28 A. L. R. 2d, page 1281*. In this case the maker of a note pledged corporate stock as collateral and executed an assignment and power of attorney to the payee reciting that the stock was sold, assigned and transferred to the payee, who was constituted irrevocable attorney for and in the name of the maker to sell, assign and transfer the stock. The Court held that the power of attorney was

coupled with an interest which could not be revoked by bankruptcy proceedings against the maker and could be revoked only by the liquidation of the indebtedness in question.

We do not purport in this petition for certiorari to exhaust the various authorities. Decisions in certain states are not always consistent, but a determination of the complicated issues involved in the case at bar would be the duty of a Court in a plenary action. The trustee in this case should have proceeded with a suit in New Jersey, either in the federal courts or in the state courts. Beneficial Finance Co. of North Jersey has its domicile there in New Jersey. The situs of the transferred notes was in New Jersey where under any concept of negotiable instrument law title had passed. The contract was not executory so far as the bankrupt was concerned. The contract was subject to interpretation by a court in New Jersey and under the construction of the New Jersey laws.

We must with all frankness admit that sometime it is a very close question as to whether a contract such as this transaction between these parties is an executed contract or executed in part and executory as to the balance, or whether it is a power coupled with an interest under the doctrine of agency. Title had passed to it. The claim of Beneficial was adversary in every respect and we do not find any cases where a bankruptcy court, even sitting in Chapter X proceedings, can by a mere summary order entered in Florida terminate all rights of a contract which had been fully executed so far as the bankrupt was concerned on January 27, 1961, or approximately a year and four months prior to the filing of the Chapter X reorganization proceedings. The lower Court did not hold that the title of Beneficial was merely colorable, but treated the contract as an executory contract which it had the right to

terminate under the provisions of Section 116 of the National Bankruptcy Act.

The question of an Appellate Court determining a question which is a mixed question of law and fact where the issue has not been passed upon by the lower Court is somewhat unusual. We will only make a brief comment by quoting from the decision of the United States Court of Appeals, 8th Cir., *William B. Cross, Appellant, v. M. R. Pasley, Appellee*, 267 F. 2d 824. This was not a bankruptcy case, but involved a case concerning the sale of certain securities in the State of Missouri. The Appellate Court pointed out—particularly in headnote "1"—that under the Federal Rules of Civil Procedure, Rule 52, in cases tried without a jury the lower Court should make specific findings of fact and conclusions of law, unless in the District Court's opinion it is clearly stated what its findings of fact are and what its conclusions of law are based upon those facts. It was pointed out that this requirement was for the purpose of aiding the Appellate Courts in their review of District Court decisions. The Appellate Court in this case said that the question of the findings of fact by the lower Court were not clear enough and sent the case back for further findings. In headnote "5", the Court made this comment:

> "It is not province of reviewing court to infer material facts."

We respectfully submit that where the entire proceedings upon the petition of the trustee, the order to show cause and the written order of the Court were founded upon the theory that the contracts in question constituted a sale but cancelled the contracts on the theory they were executory as to both parties, the United States Court of Appeals for the Fifth Circuit should not have based its opinion of affirm nce upon an entirely different theory to

the effect that these contracts were on their face nothing but agency collection agreements, which point was not briefed or was not pertinent under the decision appealed from. There has been no determination by the lower Court that even if these contracts in a plenary action would be construed to be some type of an agency collection account there was not a power coupled with an interest which would prevent the revocable doctrine being imposed against Beneficial.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

WILLIAM GRESHAM WARD
Attorney for Petitioner, Beneficial Finance Co. of North Jersey
1240 duPont Building
Miami, Florida 33131

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APPENDIX A

ORDER PERMITTING TRUSTEE TO REJECT EXECUTORY CONTRACT.

Filed Dec. 14, 1962.

(Title Omitted.)

It Appearing from the record herein that Irwin Ray, Trustee in Reorganization of Atlas Sewing Centers, Inc., and its subsidiaries, on or about the 20th day of September, 1962; filed in this Court his Petition to Reject Executory Contract, the executory contract set forth in the petition being designated as "Master Agreement No. 1", a copy of which was attached to said petition, being an agreement by and between the debtor and its subsidiaries in reorganization and Beneficial Finance Company wherein it is alleged that Beneficial Finance Company for services to be rendered to the debtors in reorganization was to purchase all of the then existing and outstanding consumer paper owned by the debtors in reorganization, the consideration to be paid therefor being 75% of all collection realized by Beneficial Finance Company from the consumer paper assigned, and, as further consideration for the collection efforts of Beneficial Finance Company, Beneficial Finance Company according to the terms of the agreement was to retain 25% of all collections made.

Upon the petition of the Trustee this Court on the 20th day of September, 1962, prescribed the form and manner in which notice was to be given of a hearing to be conducted on the Trustee's petition and the persons to whom notice was to be directed, the Court having set the 8th day of November, 1962, at 2:00 o'clock P. M., Federal Building,

Miami, Florida, before the undersigned Judge as the time and place for said hearing.

On November 8th, 1962, in accordance with the order affixing the hearing, and in accordance with the notice prescribed by this Court and given by the Trustee, a hearing was conducted in open Court before me, at which time there were present J. Edward Worton, as attorney for Irwin Ray, Trustee; Shutts, Bowen, Simmons, Prevatt & Boureau, by Seneca B. Anderson, Esq., attorneys for Beneficial Finance Company; Randolph Guthrie, Esq., attorney for Majority Holders; Downey & Lewis, and Nicholson, Howard & Brawner, by Frank A. Howard, Esq., attorneys for Belk's Department Store; Irving M. Wolff, Esq., and Phillips, attorneys for Banco Popular de Puerto Rico; Harold Friedman, Esq., attorney for Brother International; and Patton & Kanner by Samuel J. Kanner, Esq., attorneys for the debtors.

At the time of the hearing the respondent, Beneficial Finance Company, filed in the proceedings a Motion to Dismiss the petition of the Trustee, alleging the lack of this Court's jurisdiction over the Trustee's petition and the subject matter thereof. In support of the Trustee's petition the Trustee presented testimony of witnesses for this Court's consideration, the same being: Herbert Kern, President of the debtors in reorganization; Eugene C. Rosiere, Vice President of the debtors in reorganization; and Charlotte Blackburn, Vice President of the debtors in reorganization. In addition the Trustee presented in support of his petition Exhibits #1, #2 and #3, which were admitted into evidence.

And it further appearing at the time of the hearing that the attorney for Beneficial Finance Company, at the conclusion of the Trustee's case, requested that this Court grant to Beneficial Finance Company a period of ten (10)

days within which to advise the Court whether or not Beneficial Finance Company desired by way of rebuttal of the Trustee's evidence to offer any evidence on its own; and the Court at the time of the entry of this order not having received any advice from Beneficial Finance Company in respect of its request for time to enter rebuttal evidence, it is concluded by this Court at this time that Beneficial Finance Company does not intend to offer any evidence,

Now upon the verified petition of the Trustee, the Motion to Dismiss filed herein by Beneficial Finance Company, the Answer to the Trustee's petition filed by the Majority Holders, and upon the testimony of witnesses, the Trustee's exhibits and the entire proceedings held before me on the 8th day of November, 1962, it appearing to the Court that the contract by and between the debtors in reorganization and Beneficial Finance Company is executory and burdensome to the estate of the debtors, it is

Ordered that Irwin Ray, Trustee in Reorganization of the debtors herein, be and he hereby is permitted to reject the contract designated "Master Agreement No. 1" by and between the debtors in reorganization and Beneficial Finance Co. of North Jersey, dated the 27th day of January, 1961. It is

Further Ordered that the entry of this order shall be deemed to constitute a rejection of said contract by the Trustee, Irwin Ray. It is

Further Ordered that the Motion to Dismiss filed by Beneficial Finance Company be and the same is hereby denied. It is

Further Ordered that Beneficial Finance Co. of North Jersey, its subsidiaries and affiliates wherever located, forthwith account to the Trustee, Irwin Ray, for all monies

collected and all monies expended pursuant to the terms and conditions of the agreement dated January 27th, 1961, to date. It is

Further Ordered that Beneficial Finance Co. of North Jersey, its subsidiaries and affiliates wherever located, forthwith turn over to the Trustee, Irwin Ray, all customer ledger cards, contracts, agreements, mortgages, notes, and customer paper of any and all description, held presently by Beneficial Finance Co. of North Jersey, its subsidiaries and affiliates, received pursuant to the terms of Master Agreement #1, dated January 27th, 1960. It is

Further Ordered that the Trustee, Irwin Ray, be and he is hereby authorized to forthwith embark upon collection of the accounts receivable, contracts, agreements, mortgages, notes and customer paper received from Beneficial Finance Co. of North Jersey, its subsidiaries and affiliates, which are turned over to him by virtue of the entry of this order, and that the Trustee, upon collecting monies from said receivables turned over to him, shall maintain and keep separate accounts in authorized depositories for the receipt of funds from those sources by him.

Done and Ordered at Miami, Florida, on this the 14th day of December, 1962.

EMETT C. CHOATE,
United States District Judge.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20302

BENEFICIAL FINANCE CO. OF NORTH JERSEY,
Appellant,

versus

IRWIN RAY, as Trustee under Reorganization Proceedings of ATLAS SEWING CENTERS, INC.,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(February 17, 1964.)

Before TUTTLE, Chief Judge, and PHILLIPS* and JONES, Circuit Judges.

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*Of the Tenth Circuit, sitting by designation.

PER CURIAM: It appearing that the written documents under which the conditional sales contracts here were transferred to appellant constituted appellant an agent only for collection of the contracts, we conclude that the trial court did not err in entering a summary turnover order. A reading of the contracts under which Beneficial obtained possession of the property makes it plain that it had no adverse claim of title to the contracts that was more than colorable. As we stated in *B. F. Avery & Sons Co.* v. *Davis*, 5 Cir., 192 F. 2d 255, quoted with approval in *Spach, Trustee* v. *Fisher*, 5 Cir., 310 F. 2d 328, 330:

> "Where a controversy arises as to whether there is such an adverse claim, the rule is that the referee can summarily enquire into it, and if it clearly appears that possession was in or for the bankrupt, and the adverse claim or right is only colorable, he may make a judgment accordingly; but if there be a possession before bankruptcy that was really adverse and asserted in good faith the referee may not adjudge its merits, but the trustee must seek relief by a plenary suit."

The order of the trial court is AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1963

No. 20302

D. C. Docket No. 168-62-M-BK-EC

BENEFICIAL FINANCE CO. OF NORTH JERSEY,
Appellant,

versus

IRWIN RAY, as Trustee under Reorganization Proceedings of ATLAS SEWING CENTERS, INC.,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, Chief Judge, and PHILLIPS* and JONES, Circuit Judges.

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*Of the Tenth Circuit, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Beneficial Finance Co. of North Jersey, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

February 17, 1964

Issued as Mandate:

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20,302

BENEFICIAL FINANCE CO. OF NORTH JERSEY,
Appellant,

v.

IRWIN RAY, as Trustee under Reorganization Proceedings of ATLAS SEWING CENTERS, INC.,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(March 17, 1964.)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, and PHILLIPS* and JONES, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

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*Of the Tenth Circuit, sitting by designation.

Office-Supreme Court, U.S.
FILED
JUL 13 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 19

No. 184

BENEFICIAL FINANCE CO. OF NORTH JERSEY,

Petitioner,

vs.

IRWIN RAY, As Trustee under Reorganization Proceedings of ATLAS SEWING CENTERS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. EDWARD WORTON
548 Pan American Bank Bldg.
Miami, Florida 33131
Attorney for IRWIN RAY, As Trustee under Reorganization Proceedings of ATLAS SEWING CENTERS, INC., Respondent

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IN THE

Supreme Court of the United States

October Term, 19

No. _____

BENEFICIAL FINANCE CO. OF NORTH JERSEY,

Petitioner,

vs.

IRWIN RAY, As Trustee under Reorganization Proceedings of ATLAS SEWING CENTERS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of Florida, Miami Division, dated the 14th day of December, 1962, is not reported, but is reproduced at Appendix "A", infra, p. A1, and is further reflected at pages 95 through 99, both inclusive, in the printed Transcript of the Record. The opinion of the Court of Appeals for the Fifth Circuit, dated February 17, 1964, is reported at 328 F. 2d 55, and for the Court's convenience is repro-

duced at Appendix "B", infra, p. A5. The petition for rehearing was denied on the 17th day of March, 1964, reproduced at Appendix "C", infra, p. A9, and the judgment and mandate of the Court was entered on the 17th day of March, 1964.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on the 17th day of February, 1964, and recorded February 17, 1964, a copy thereof being appended to this brief at Appendix "B", infra, p. A7. The opinion of the Court is dated the 17th day of February, 1964 (Appendix "B", infra, p. A5). The petition for Rehearing was timely filed and was denied on March 17th, 1964, and final judgment of the Court and mandate was issued on the 17th day of March, 1964, all shown at the Appendix attached hereto and above referred to.

The jurisdiction of the Supreme Court of the United States is invoked under 11 U.S.C., Sec. 47(c), (30 Stat. 553 as amended) and Title 28 U. S. C., 1254 (1), (62 Stat. 928).

QUESTIONS PRESENTED

1. Whether the United States District Court for the Southern District of Florida, Miami Division, sitting as a reorganization court, correctly found that the Master Agreement No. 1 dated January 27th, 1961, by and between Beneficial Finance Co. of North Jersey and Atlas Sewing Centers, Inc., and its subsidiaries is an executory contract?

2. Whether the reorganization court, pursuant to the terms and provisions of section 116(1) of Chapter X of the Act of Congress relating to bankruptcy was entitled, upon proper petition and proper notice to interested persons, to reject an improvident executory contract of the debtor in reorganization?

3. Whether the judgment of the United States Court of Appeals for the Fifth Circuit in the instant case correct and is not in conflict with any other decision so as to warrant further review of the case by this Court?

STATUTES INVOLVED

The applicable statute (Sec. 116, National Bankruptcy Act, 11 U.S.C., Sec. 516, paragraph 1) is printed in the Appendix, infra, p. A10.

STATEMENT

The debtor, Atlas Sewing Centers, Inc., on June 22nd, 1962, filed in the United States District Court in and for the Southern District of Florida, Miami Division, its voluntary Petition for Reorganization pursuant to the terms and provisions of Chapter X of the Act of Congress relating to bankruptcy (R. 3-21). On the same day the Court issued its injunction (R. 22), approved the voluntary petition and appointed IRWIN RAY Trustee (R. 24-35).

Subsequently an amendment was filed to the original voluntary Petition for Reorganization, requesting that there be included in the proceedings wholly owned sub-

sidiaries, upon which a second injunctive order was entered (R. 54-59).

The Trustee entered into an operational agreement with Brother International Corporation whereby Brother International Corporation agreed to operate the debtor and its subsidiaries, bearing all losses resulting from the operation of the business and paying to the Trustee all profits accruing from the operation of the business (R. 60).

The Trustee in his report to the Court under date of August 14th, 1962, set forth that Beneficial Finance Company was not rendering a proper accounting to the Trustee in respect of consumer paper it held, and he recommended to the Court that he be authorized to travel to New York City to investigate more thoroughly the acts and liabilities of the debtor corporation in respect to the agreement with Beneficial Finance Company, dated January 27th, 1961 (R. 66).

As a result of the investigation made by the Trustee there was filed on September 21st, 1962, Trustee's Petition to Reject Executory Contract by and between the debtor and its subsidiaries and Beneficial Finance Company of North Jersey (R. 70-82). The Trustee's Petition to Reject Executory Contract resulted in the Court's Order Fixing Hearing on the Trustee's petition and directing persons who should receive copies of the order setting hearing and copies of the Trustee's petition (R. 82-87), the Court having jurisdiction by virtue of Section 116(1) of Chapter X of the Act of Congress relating to bankruptcy, 11 U.S.C., Sec. 516(1).

On the date of the hearing Beneficial Finance Company through its previous counsel filed a Motion to Strike before the presiding Judge (R. 94-95). Subsequent to the Trustee's presentation of his evidence in support of his Petition to Reject Executory Contract (Master Agreement No. 1), the Court permitted Beneficial ten (10) days within which to advise the Court whether or not Beneficial desired to rebut the Trustee's evidence (R. 97). This Beneficial failed to do.

After the entry of the order permitting rejection of the executory contract, Irving Trust Company as Agent for numerous participating banks, acting through their attorney, Randolph H. Guthrie, withdrew all opposition to the entry of said order, said withdrawal of opposition being in the form of Petition of Trustee for Authority to Execute Release, with copy of Release, and Order Authorizing Trustee to Execute Release.

In its motion filed in the lower court for the fixing of a stay order pending appeal Beneficial stated the sole issue raised in the appeal is the question of the jurisdiction of the lower court to determine in a summary proceeding that the accounts held by Beneficial Finance Co. of North Jersey were held by virtue of an executory contract when Beneficial claimed that the accounts were owned outright and that the assignments of accounts had been fully and completely executed prior to the bankruptcy proceeding (R. 111).

At the hearing before the lower court on the 8th of November, 1962, in the colloquy between the Court and counsel, it was brought out that Beneficial collected the gross amount of $5,530,039.84 upon which it collected a

commission of $1,404,316.95. In addition, there was charged against the collection of Atlas paper $263,739.43 as legal, accounting and consultant expenses (Sup. R. 46).

The Trustee, to support the allegations contained in his petition, at the hearing of November 8th, 1962, called as a witness Mr. Herbert Kern, former president of Atlas Sewing Centers, Inc. (Sup. R. 56). Mr. Kern testified that Atlas thought turning over consumer accounts of Atlas Sewing Centers, Inc., to Beneficial would place the company in jeopardy and generally that it was a bad move (Sup. R. 61). Mr. Kern further testified as follows: The servicing of Atlas consumer paper by Atlas Sewing Centers, Inc., was the life blood of the debtors in reorganization (Sup. R. 62). The Beneficial agreement was prepared and presented by the attorneys for Irving Trust Company and the Institutions (Sup. R. 66). Many of the Atlas accounts were "flipped-over" by Beneficial so that debtors of Atlas became in fact debtors of Beneficial Finance Company (Sup. R. 70). When the flip-over occurred, not only did Beneficial gain a consumer of its own at the expense of Atlas but also received a collection fee for the payment of the Atlas account (Sup. R. 70). Many outstanding Atlas accounts were settled by Beneficial for fifty cents on the dollar (Sup. R. 71).

Mr. Kern further testified that the cost to Atlas prior to the Beneficial agreement, in respect of the collection of consumer paper, was a little better than twelve percent (12%). Beneficial received from Atlas approximately $20 million of contracts to be collected at a cost to Atlas of twenty-five percent (25%) of the amount ultimately collected by Beneficial. According to Mr. Kern, under the Beneficial agreement (Master Agreement No.

1) Atlas stood to lose approximately $8 million (Sup. R. 82).

Mr. Eugene C. Rosiere was called by the Trustee and testified he was the vice president and general manager of the eastern division of the company (Sup. R. 89). Mr. Rosiere then introduced in evidence Trustee's Exhibit #1 which showed that, prior to the turnover of consumer accounts to Beneficial, Atlas collected 4.2 percent of consumer accounts and Beneficial collected only 2.4 percent of the accounts, graduating down to .8 percent of accounts by Beneficial in June of 1962 (Sup. R. 96).

Miss Charlotte Blackburn, vice-president of collections of Atlas Sewing Centers, Inc., was called as a witness by the Trustee (Sup. R. 103). Miss Blackburn testified that from the Beneficial accounts returned as uncollectible in one month the company was successful in collecting $20,000.00 (Sup. R. 104). She further testified that from $150,000.00 consumer accounts returned to Atlas by Beneficial Finance Company as uncollectible she was successful in collecting $32,000.00 (Sup. R. 106); and further, that Beneficial returned to Atlas as uncollectible paper on which Beneficial had by settlement collected one-half (½) of the face amount (Sup. R. 117).

All of the testimony offered by the Trustee was in support of the Trustee's Petition to Reject Executory Contract, it being the contention of the Trustee that the contract by and between Atlas Sewing Centers, Inc., and Beneficial Finance Co. of North Jersey was improvident and detrimental to the continued operation of Atlas Sewing Centers, Inc.

On December 14, 1962, United States District Judge Honorable Emett C. Choate entered an order shown in the Transcript of Record, pages 95 through 99, both inclusive. A copy of this order is attached to this brief as Appendix "A". In this order, as reflected in the Transcript of Record, on page 98, the Court based its order upon the following statement, and we quote:

> "* * * * it appearing to the Court that the contract by and between the debtors is executory and burdensome to the estate of the debtors, * * * *"

and then followed certain orders directing Irwin Ray, as Trustee, to reject the contracts between the debtors and Beneficial Finance Co. of North Jersey, dated the 27th day of January, 1961; denying the motion to dismiss filed by Beneficial; directing that the Beneficial Finance Co. of North Jersey account to Irwin Ray, as Trustee, for all moneys collected; directing that Beneficial Finance Co. of North Jersey return or turn over to the Trustee all customer ledger cards, contracts, agreements, mortgages, notes and customer paper of any and all description, held presently by Beneficial Finance Co. of North Jersey; and further directing that the Trustee embark upon the collection of these accounts receivable, contracts, agreements, mortgages, notes and customer paper, and upon the collection of any moneys to maintain and keep separate accounts for the receipt of those funds from those contracts.

Notice of appeal was filed on December 20, 1962, which resulted in the entry of the order and decision by the United States Court of Appeals, Fifth Circuit, dated

February 17, 1962, affirming the trial court in a per curiam opinion, a copy of which is attached to this brief as Appendix "B". A copy of the judgment of the United States Court of Appeals, Fifth Circuit, dated February 17, 1961, is attached as Appendix "B". A copy of the order denying the petition for rehearing, dated March 17, 1964, is attached as Appendix "C."

ARGUMENT

I.

The United States District Court for the Southern District of Florida, Miami Division, and the United States Court of Appeals for the Fifth Circuit have decided an important federal question in accordance with the principles of law enunciated by this Court in the case of *Cline* v. *Kaplan*, *322* U.S. *97*, *65* S. Ct. *155*, *89* L. Ed. *97*.

We respectfully contend that Mr. Ward, the attorney for the petitioner, Beneficial Finance Co. of North Jersey, has failed completely to understand the decisions handed down by both the District Court and the United States Court of Appeals with reference to the instant case. Not only has Mr. Ward failed to grasp those decisions, but he has propounded his lack of understanding still further by basing his reasons for granting the writ upon an *alleged* conflict with a decision this Court made in the case of *Cline* v. *Kaplan*, supra, which we submit does not conflict, but completely supports the District Court and the United States Court of Appeals in the instant case.

It is respectively tendered that the following is what this Court said in *Cline* v. *Kaplan*, supra, and nothing more:

"A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 481, 60 S. Ct. 628, 629, 84 L. Ed. 876. If the property is not in the court's possession and a third person asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto'. Gaibraith v. Vallely, 256 U. S. 46, 50, 41 S. Ct. 415, 416, 65 L. Ed. 823; Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 44 S. Ct. 396, 68 L. Ed. 770. But the mere assertion of an adverse claim does not oust a court of bankruptcy of its jurisdiction. Harrison v. Chamberlin, 271 U. S. 191, 194, 46 S. Ct. 467, 468, 70 L. Ed. 897. It has both the power and the duty to examine a claim adverse to the bankrupt estate to the extent of ascertaining whether the claim is ingenuous and substantial. Louisville Trust Co. v. Comingor, 184 U. S. 18, 25, 26, 22 S. Ct. 293, 296, 46 L. Ed. 413. Once it is established that the claim is not colorable nor frivolous, the claimant has the right to have the merits of his claim passed on in a plenary suit and not summarily. Of such a claim the bankruptcy court cannot retain further jurisdiction unless the claimant consents to its adjudication in the bankrupcy court. MacDonald v. Plymouth County Trust Co., 286 U. S. 263, 52 S. Ct. 505, 76 L. Ed. 1093."

Thus it can be seen that this Honorable Court has laid the "guide lines" and outlined the "ground rules" for a bankruptcy court when the question of whether a bankruptcy court has summary rights is raised. The record in the instant case shows that this Court's "guide lines" and "ground rules" have been followed completely and absolutely without the slightest deviation.

The United States District Court for the Southern District of Florida, Miami Division, the Honorable Emett C. Choate presiding, determined the question of summary jurisdiction and held that the Master Agreement No. 1 between the petitioner and the respondent's debtor is purely *executory*. On the basis of these findings the District Court properly held that it had summary jurisdiction based on the United States Statutes, Section 116 of the National Bankruptcy Act, 11 U.S.C., Sections 511-521, paragraph 1, which grants authority as follows:

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the Court—
>
> (1) permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such contracts and to such other parties in interest as the judge may designate."

The United States Court of Appeals for the Fifth Circuit in a per curiam decision in the instant case properly held that the trial court did not err in entering a summary turnover order. Referring to the executory

contracts (Master Agreement No. 1) they said "A reading of the contracts under which Beneficial obtained possession of the property makes it plain that it had no adverse claim of title to the contracts that was more than colorable". The Court of Appeals then referred to a statement they made in *B. F. Avery and Sons Co. v. Davis*, *192* F. 2d *255*, (5th Cir. 1951) and quoted with approval in *Spach, Trustee* v. *Fisher*, *310* F. 2d *328*, *330* (5th Cir. 1962):

> "Where a controversy arises as to whether there is such an adverse claim, the rule is that the referee can summarily enquire into it, and if it clearly appears that possession was in or for the bankrupt, and the adverse claim or right is only colorable, he may make a judgment accordingly; but if there be a possession before bankruptcy that was really adverse and asserted in good faith the referee may not adjudge its merits, but the trustee must seek relief by a plenary suit."

The instant case follows the *Avery* statement completely. Possession of the sales contract was "in or for the bankrupt" because the Master Agreement No. 1 between the petitioner and respondent's debtor was merely *executory*. Therefore, the petitioner's adverse claim or right was only colorable. Thus the proper summary jurisdiction was found accordingly and there is absolutely no conflict with this Court's decision in *Cline* v. *Kaplan*, supra. The facts were properly determined by the District Court, Judge Choate presiding, when he held that the Master Agreement No. 1 was executory and he therefore properly assumed summary jurisdiction as authorized in the National Bankruptcy Act, Section 116, supra.

The United States Court of Appeals for the Fifth Circuit said that the petitioner here was "an agent only for collection of the contracts". We fail to see why this statement disturbs the petitioner. Since the Master Agreement No. 1 was properly found to be *executory*, the United States Court of Appeals for the Fifth Circuit merely referred to the petitioner in his proper capacity, which was "agent only for collection of the contracts". We are certain the petitioner would not prefer to be labeled a "*converter*" of the contracts.

It is respectfully submited that approximately $20,000,000.00 in sales contracts were transferred to the petitioner for collection. The respondent's debtor received nothing for these sales contracts upon transfer. As some of the sales contracts were collected, the respondent's debtor was credited with 75% of the collections. However, the petitioner later returned $6,029,836.32 worth of sales contracts to the respondent's debtor which were charged off as uncollectible. If there had been a completed contract (Master Agreement No. 1), we submit Beneficial would not have returned these contracts to Atlas. Therefore the very *intent* of the parties was that Beneficial would act as "agent only for the collection" of the sales contracts and share only in the *proceeds* of the agency, which was 25% of whatever collections they could make on these accounts. The record shows Beneficial collected commission of approximately $1,500,000.00 in this agency relationship.

In order to arrive at a proper conclusion and answer to this question all of the attendant circumstances surrounding the transaction by and between the parties to the agreement must be examined.

Master Agreement No. 1 is set forth in the Supplemental Record (Sup. R. 2-11). The agreement is directed to Beneficial Finance Co. of North Jersey and states in material part as follows:

> "We desire to sell you or to such one or more of your affiliated corporations or associated companies as you may designate, for the purposes agreed upon, all of our notes, chattel mortgages, conditional sale agreements, and other obligations arising out of the sale of personal property (all herein called 'notes')." (Sup. R. 2)

With respect to the *unascertained* purchase price to be paid by Beneficial Finance Co. Master Agreement No. 1 states as follows:

> "Purchase Price of Notes. The amount which you will pay for the assignment of any such note shall be 75% of the actual collections on such note, giving effect of course, in determining such amount, to any refund or credit of the time price differential, finance charge or the like." (Sup. R. 3)

Another part of the agreement is as follows:

> "Reassignment. In the event you, in your sole discretion, determine that any note assigned pursuant to this agreement is uncollectible, or there is a lapse of six months from the date of the last collection made by you or the obligor on such note alleges that the note has been paid in

full or that the personal property covered thereby has been returned, you may reassign and deliver such note without representation, without warranty and without recourse, to such person as shall be designated by Irving Trust Company as said Agent and you shall be under no obligation to make any further collections with respect to such notes." (Sup. R. 5-6)

It is necessary additionally to consider Agreement No. 1 between the Majority Holders and Atlas Sewing Centers, Inc., and subsidiaries, dated January 27th, 1961 (Appendix "E", infra, p. A11). Said agreement states in part:

"2. We (Atlas) hereby agree and confirm that any and all assignments of notes made pursuant to the Master Agreement shall be deemed to be and shall be assignments for the purpose of securing payment of the Institution Indebtedness and certain obligations of the undersigned as set forth in and contemplated by said Agreement made as of November 9, 1960, all as if such assignments contained express provisions to such effect, subject to the rights of Beneficial under the Master Agreement.

"3. You and we hereby confirm that the Master Agreement constitutes an agreement for servicing the collection of the notes by Beneficial and a security device for the benefit of the Institutions and certain other creditors of the undersigned as aforesaid supplementing the provisions of aforesaid Agreement made as of No-

vember 9, 1960, and all assignments heretofore executed and delivered by the undersigned for such purpose, and, notwithstanding anything herein or in the Master Agreement to the contrary, *does not constitute a loan by, or other disposition of the notes to, Beneficial.* We will make no changes in the Master Agreement without first consulting you and obtaining your prior written consent." (Appendix "E", infra, p. A12, A13) (Emphasis ours.)

And further:

"5. (a) This agreement, the Master Agreement and Agreement No. 1 dated January 27, 1961 between the Majority Holders and Beneficial shall constitute a supplement within the terms and provisions of the Agreement made as of November 9, 1960, with Beneficial being hereby substituted for the Custodian with respect to the notes delivered to it and also for the banks of deposit." (Appendix "E", infra, p. A13)

To further enlighten the Court with respect to the intention of the parties, Agreement No. 1 between Beneficial Finance Co. of North Jersey and Majority Holders, dated January 27, 1961, (Appendix "F", infra, p. A18) must be examined. In said agreement it is stated to Beneficial by Majority Holders:

"No disposition shall be made by you of any property repossessed or returned except with the consent of the Majority Holders or their agent." (Appendix "F", infra, p. A19)

Petitioner incorrectly claims that Master Agreement No. 1, despite the attendant circumstances, and despite the terms of the agreement itself, constituted an absolute sale to it by Atlas Sewing Centers, Inc., and subsidiaries of all consumer paper held by Atlas on the date of the agreement, i.e., January 27th, 1961.

It is respectfully urged upon this Court that the true intent of Master Agreement No. 1 was well established by the Majority Holders for whose benefit admittedly the agreement was entered into, when it was stated supra in Agreement No. 1 between the Majority Holders and Atlas Sewing Centers, Inc., and subsidiaries that "the Master Agreement * * * constitutes * * * a *security device* for the benefit of the Institutions * * *." (Emphasis ours.)

It is submitted that the axis agreement by and between Beneficial Finance Co. of North Jersey and the Majority Holders contributed more than any other single given factor to the present financial difficulties of the debtor in reorganization, Atlas Sewing Centers, Inc., and subsidiaries.

Not only does the Trustee have an obligation but under the circumstances the Trustee has a duty to the Court, creditors, bondholders and stockholders of the debtor in reorganization to set aside Master Agreement No. 1 by and between the debtor and subsidiaries and Beneficial Finance Co. of North Jersey. It might be pointed out that at this time in the proceedings there are the interests of thousands of stockholders (the company being listed on the American Exchange) and creditors to be considered.

This Court in *Hatch* v. *Standard Oil Co.*, 100 U. S. 130, 25 L. Ed. 554 clearly stated when, and under what circumstances, an agreement is merely executory, when it said:

> "When the agreement for sale is of a thing not specified, or for an article not manufactured, or of a certain quantity of goods in general without any identification of them or an appropriation of the same to the contract, or when something remains to be done to put the goods into a deliverable state, or to *ascertain the price to be paid by the buyer*, the contract is merely an executory agreement, unless it contains words warranting a different construction, *or there be something in the subject-matter or the circumstances to indicate a different intention.*" (Emphasis ours.)

Again in *Farrington* v. *Tenn.* 95 U. S. 683, 24 L. Ed. 558, this Court states:

> "Contracts are executed or executory. A contract is executed where everything that was to be done is done, and nothing remains to be done. * * * An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not be done by one or both the parties. * * * "

Let us apply the principles pronounced by this Court with respect to executory contracts to the Master Agreement No. 1. Master Agreement No. 1 uses such phraseology as:

"We desire to sell * * * " (Sup. R. 2):

"The amount which you will pay for the assignment of any such note shall be 75% of the actual collections on such note * * *" (Sup. R. 3); and "* * * we will pay you $10.00 for handling the repossession and if the obligor resides more than ten miles from your said office, we will pay you $20.00." (Sup. R. 4)

Certainly such language and the attendant circumstances show the *true intent* of the parties and the *executory* nature of Master Agreement No. 1. There certainly is no true sale within the legal meaning of the word sale. The "price" to be paid by Beneficial for the assignment of consumer contracts to Beneficial under the agreement *cannot be ascertained until the entire agreement has been fulfilled and completed.* The "price" which Beneficial was to have paid under the terms of the agreement is 75% of whatever collections *might* be made of consumer installment contracts by Beneficial. The *indefiniteness* of the Master Agreement No. 1 must defeat the petitioner's claim.

In addition, obligations are imposed upon the debtors with respect to repossession of sewing machines and servicing of the machines. This, it is submitted, is a continuing obligation on the part of the debtor and its subsidiaries, which negates the theory of finality in the contract.

"A contract is executed where everything that was to be done is done, and nothing remains to be done." *Farrington v. Tenn.*, supra.

Can we apply this principal to Master Agreement No 1? The answer most obviously is NO, because here we find everything undone, indefinite and unascertained.

(See also *Collier on Bankruptcy*, 14th Edition, Volume 6, paragraph 2.11, page 386, "Definition of 'Executory Contract', § 106(7)".)

This agreement (Master Agreement No. 1) cannot constitute an executed contract until the last installment of consumer accounts assigned to Beneficial is collected and commission paid, or until the last servicing of consumer commodity is made by Atlas Sewing Centers, Inc., or subsidiaries, or until the last repossession of personal property covered by the consumer contracts is made. Then and only then can this agreement be considered as an executed contract.

Under the circumstances of the analysis of Master Agreement No. 1, it is hardly necessary to examine the attendant circumstances to determine the intent of the parties as reflected by the Majority Holders Agreement No. 1 with the debtors in reorganization and the Majority Holders Agreement No. 1 with Beneficial Finance Co. of North Jersey. However, in passing, to enlighten the Court in its determination as to the executory nature of Master Agreement No. 1, it is shown that this contract (Master Agreement No. 1) was *not* considered to be an executed contract of sale. By the confession of the parties to the various agreements it was designated a "*security device*" (Majority Holders Agreement No. 1 with Atlas Sewing Centers, Inc., and subsidiaries) (Appellant's Brief, Appendix 1).

It is respectfully submitted upon the argument presented and upon the record that this Court must find that Master Agreement No. 1 is *executory* in nature for the reasons herein stated, and remained so at the time of the Trustee's petition to the United States District Court for the Southern District of Florida, Miami Division, to reject the executory contract pursuant to the terms of Chapter X of the Act of Congress relating to bankruptcy. Section 116(1).

II.

The United States District Court for the Southern District of Florida and the United States Court of Appeals for the Fifth Circuit have decided an important federal question not only in accordance with the principles of law enunciated by this Court in the case of *Cline* v. *Kaplan* *322* U. S. *97*, *65* S. Ct. *155*, *89* L. Ed. *97*, but in accordance with the United States Courts of Appeals for the Ninth and Second Circuits in the cases of *Sulmeyer* v. *Pfohlman*, *329* F. 2d *915* (9th Cir. 1964); and *Cherno, Trustee In Bankruptcy* v. *Engine Air Service, Inc.*, *330* F. 2d *191* (2nd Cir., 1964).

It is respectfully submitted to this Court that the alleged conflicts in decisions cited by the petitioner in his brief (pgs. 21-24) *are not conflicts*, but rather these decisions are in accordance with the decisions in the instant case.

The petitioner quotes (petitioner's brief, page 22) *Sulmeyer* v. *Pfohlman*, supra, at pg. 917 as follows:

"One or the other of two elements must be present in order for the bankruptcy court to have summary jurisdiction to determine interests in property. Either the bankrupt must have had actual or constructive possession of the property at the time of the filing, or the claim asserted against the property must not have been 'substantial' and 'adverse'. Martoff v. Elliott, Trustee, 9 Cir., 326 F. 2d 204."

Here we are forced to once again answer the petitioner's incorrect claim of conflict in decisions. With reference to the two elements listed above necessary for a bankruptcy court to have summary jurisdiction:

1. The respondent's debtor in the instant case had actual or constructive possession of the property at the time of filing because the Master Agreement No. 1 was merely executory.

2. The petitioner's alleged claim was *not* substantial or adverse, but merely *colorable* because the Master Agreement No. 1 was *executory*.

In the *Cherno* case, supra, the petitioner once again tries to fit a round peg into a square hole. *Cherno* involves a security deposit to a landlord, a lease and a question of a refund of the deposit. That is *not* the instant case, nor on the basis of the facts is there any conflict in decisions.

Therefore, both the United States District Court for the Southern District of Florida, Miami Division, and the United States Court of Appeals for the Fifth Circuit

were correct in their decisions in the instant case and no conflict in decisions exists as alleged by the petitioner.

III.

The United States Court of Appeals for the Fifth Circuit and the United States District Court for the Southern District of Florida, Miami Division, have decided the instant case in the accepted and usual course of jurisdictional proceedings as approved and sanctioned by this Court.

The petitioner in his brief at page 26 quotes as follows:

> "The clearest instance of a power coupled with an interest is where, as a part of the arrangement with his principal, the agent receives title to all or a part of the subject matter of the agency, as distinguished from title to all or a part of the *proceeds of the agency*." (Emphasis ours.)

We respectfully submit that the petitioner received title to only 25% of the "proceeds of the agency" (after collection) which amounted to approximately $1,500,000.00 as commissions for collection of a portion of the accounts. This was truly the intent of the parties as evidenced by the petitioner's return to Atlas of $6,029,836.32 worth of contracts as uncollectible. If the petitioner had title to these contracts or thought it was vested with title there would have been no logical reason to return these contracts to Atlas. The petitioner's actions defeat his claims.

Petitioner claims (petitioner's brief, pg. 26) that

Dore v. *Cowlitz Valley Bank*, 191 Wash. 429, 71 P. 2d 555 (1937), is "nearly in point" with the instant case. We submit that the petitioner once again is in error, because in the *Dore* case there was a note and a debt and the pledged corporate stock was used as collateral security for the note. That is not this case. If the petitioner cannot distinguish these facts from the facts in the instant case, *where we merely have an agent for the collection of some accounts*, then the petitioner has missed the point entirely.

CONCLUSION

The Petition for the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

J. EDWARD WORTON

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APPENDIX A

ORDER PERMITTING TRUSTEE TO REJECT EXECUTORY CONTRACT

Filed Dec. 14, 1962.

(Title Omitted.)

It Appearing from the record herein that Irwin Ray, Trustee in Reorganization of Atlas Sewing Centers, Inc., and its subsidiaries, on or about the 20th day of September, 1962, filed in this Court his Petition to Reject Executory Contract, the executory contract set forth in the petition being designated as "Master Agreement No. 1", a copy of which was attached to said petition, being an agreement by and between the debtor and its subsidiaries in reorganization and Beneficial Finance Company wherein it is alleged that Beneficial Finance Company for services to be rendered to the debtors in reorganization was to purchase all of the then existing and outstanding consumer paper owned by the debtors in reorganization, the consideration to be paid therefor being 75% of all collection realized by Beneficial Finance Company from consumer paper assigned, and, as further consideration for the collection efforts of Beneficial Finance Company, Beneficial Finance Company according to the terms of the agreement was to retain 25% of all collections made.

Upon the petition of the Trustee this Court on the 20th day of September, 1962, prescribed the form and manner in which notice was to be given of a hearing to be conducted on the Trustee's petition and the persons to whom notice was to be directed, the Court having set the 8th day of November, 1962, at 2:00 o'clock P. M.,

Federal Building, Miami, Florida, before the undersigned Judge as the time and place for said hearing.

On November 8th, 1962, in accordance with the order affixing the hearing, and in accordance with the notice prescribed by this Court and given by the Trustee, a hearing was conducted in open Court before me, at which time there were present J. Edward Wortor, as attorney for Irwin Ray, Trustee; Shutts, Bowen, Simmons, Prevatt & Boureau, by Seneca B. Anderson, Esq., attorneys for Beneficial Finance Company; Randolph Guthrie, Esq., attorney for Majority Holders; Downey & Lewis, and Nicholson, Howard & Brawner, by Frank A. Howard, Esq., attorneys for Belk's Department Store; Irving M. Wolff, Esq., and Phillips, attorneys for Banco Popular de Puerto Rico; Harold Friedman, Esq., attorney for Brother International; and Patton & Kanner by Samuel J. Kanner, Esq., attorneys for the debtors.

At the time of the hearing the respondent, Beneficial Finance Company, filed in the proceedings a Motion to Dismiss the petition of the Trustee, alleging the lack of this Court's jurisdiction over the Trustee's petition and the subject matter thereof. In support of the Trustee's petition the Trustee presented testimony of witnesses for this Court's consideration, the same being: Herbert Kern, President of the debtors in reorganization; Eugene C. Rosiere, Vice President of the debtors in reorganization; and Charlotte Blackburn, Vice President of the debtors in reorganization. In addition the Trustee presented in support of his petition Exhibits =1, =2 and =3, which were admitted into evidence.

And it further appearing at the time of the hearing

that the attorney for Beneficial Finance Company, at the conclusion of the Trustee's case, requested that this Court grant to Beneficial Finance Company a period of ten (10) days within which to advise the Court whether or not Beneficial Finance Company desired by way of rebuttal of the Trustee's evidence to offer any evidence on its own; and the Court at the time of the entry of this order not having received any advice from Beneficial Finance Company in respect of its request for time to enter rebuttal evidence, it is concluded by this Court at this time that Beneficial Finance Company does not intend to offer any evidence.

Now upon the verified petition of the Trustee, the Motion to Dismiss filed herein by Benefician Finance Company, the Answer to the Trustee's petition filed by the Majority Holders, and upon the testimony of witnesses, the Trustee's exhibits and the entire proceedings held before me on the 8th day of November, 1962, it appearing to the Court that the contract by and between the debtors in reorganization and Beneficial Finance Company is executory and burdensome to the estate of the debtors, it is

Ordered that Irwin Ray, Trustee in Reorganization of the debtors herein, be and he hereby is permitted to reject the contract designated "Master Agreement No. 1" by and between the debtors in reorganization and Beneficial Finance Co. of North Jersey, dated the 27th day of January, 1961. It is

Further Ordered that the entry of this order shall be deemed to constitute a rejection of said contract by the Trustee, Irwin Ray. It is

Further Ordered that the Motion to Dismiss filed by Beneficial Finance Company be and the same is hereby denied. It is

Further Ordered that Beneficial Finance Co. of North Jersey, its subsidiaries and affiliates wherever located, Forthwith account to the Trustee, Irwin Ray, for all monies collected and all monies expended pursuant to the terms and conditions of the agreement dated January 27th, 1961, to date. It is

Further Ordered that Beneficial Finance Co. of North Jersey, its subsidiaries and affiliates wherever located, forthwith turn over to the Trustee, Irwin Ray, all customer ledger cards, contracts, agreements, mortgages, notes, and customer paper of any and all description, held presently by Beneficial Finance Co. of North Jersey, its subsidiaries and affiliates, received pursuant to the terms of Master Agreement #1, dated January 27th, 1960. It is

Further Ordered that the Trustee, Irwin Ray, be and he is hereby authorized to forthwith embark upon collection of the accounts receivable, contracts, agreements, mortgages, notes and customer paper received from Beneficial Finance Co. of North Jersey, its subsidiaries and affiliates, which are turned over to him by virtue of the entry of this order, and that the Trustee, upon collecting monies from said receivables turned over to him, shall maintain and keep separate accounts in authorized depositories for the receipt of funds from those sources by him.

Done and Ordered at Miami, Florida, on this the 14th day of December, 1962.

EMETT C. CHOATE,
United States District Judge.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20302

BENEFICIAL FINANCE CO. OF NORTH JERSEY,

Appellant,

versus

IRWIN RAY, as Trustee under Reorganization Proceedings of ATLAS SEWING CENTERS, INC.,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(February 17, 1964.)

Before TUTTLE, Chief Judge, and PHILLIPS* and JONES, Circuit Judges.

PER CURIAM: It appearing that the written documents under which the conditional sales contracts here were transferred to appellant constituted appellant an

*Of the Tenth Circuit, sitting by designation.

agent only for collection of the contracts, we conclude that the trial court did not err in entering a summary turnover order. A reading of the contracts under which Beneficial obtained possession of the property makes it plain that it had no adverse claim of title to the contracts that was more than colorable. As we stated in *B. F. Avery & Sons Co. v. Davis*, 5 Cir., 192 F. 2d 255, quoted with approval in *Spach, Trustee v. Fisher*, 5 Cir., 310 F. 2d 328, 330:

> "Where a controversy arises as to whether there is such an adverse claim, the rule is that the referee can summarily enquire into it, and if it clearly appears that possession was in or for the bankrupt, and the adverse claim or right is only colorable, he may make a judgment accordingly: but if there be a possession before bankruptcy that was really adverse and asserted in good faith the referee may not adjudge its merits, but the trustee must seek relief by a plenary suit."

The order of the trial court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1963

No. 20302

D. C. Docket No. 168-62-M-BK-EC

BENEFICIAL FINANCE CO. OF NORTH JERSEY,
Appellant,

versus

IRWIN RAY, as Trustee under Reorganization Proceedings of ATLAS SEWING CENTERS, INC.,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, Chief Judge, and PHILLIPS* and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

*Of the Tenth Circuit, sitting by designation.

On CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Beneficial Finance Co. of North Jersey, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

February 17, 1964

Issued as Mandate:

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20302

BENEFICIAL FINANCE CO. OF NORTH JERSEY,

Appellant.

versus

IRWIN RAY, as Trustee under Reorganization Proceedings of ATLAS SEWING CENTERS, INC.,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(March 17, 1964.)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, and PHILLIPS* and JONES, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

*Of the Tenth Circuit, sitting by designation.

APPENDIX D

SECTION 116, NATIONAL BANKRUPTCY ACT, 11 U.S.C., Section 516, paragraph 1.

"Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties herein above and elsewhere in this chapter conferred and imposed upon him and the court —

(1) permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate;"

APPENDIX E

AGREEMENT No. 1

between

MAJORITY HOLDERS

and

ATLAS SEWING CENTERS, INC.

and

SUBSIDIARIES

January 27, 1961

TO: MAJORITY HOLDERS UNDER AGREEMENT MADE AS OF NOVEMBER 9, 1960, AS AMENDED

Referring to the Agreement made as of November 9, 1960, as amended, and to the proposed form of Master Agreement No. 1 dated January 27, 1961 between the undersigned and Beneficial Finance Co. of North Jersey (hereinafter called the "Master Agreement" and Beneficial", respectively), we hereby confirm our agreement with you as follows:

1. We agree that any notes (as defined in the Master Agreement) delivered to Beneficial or to any of its affiliated corporations or associated companies as may be designated by it pursuant to the Master Agreement (for the purposes of this agreement, the term "Beneficial" shall include all such corporations and companies) are to be held, subject to the rights of Beneficial, in pledge and as security for the Institution Indebtedness owing to the

Institutions (the terms "Institution Indebtedness" and "Institutions" being as defined in the aforesaid Agreement made as of November 9, 1960) and other obligations of the undersigned provided to be paid in said Agreement made as of November 9, 1960, all in accordance with and as contemplated by the terms thereof and, subject to the aforesaid rights of Beneficial, all moneys collected by Beneficial under the Master Agreement shall be held by Beneficial as security for the Institution Indebtedness and such other obligations, and when any such moneys are paid over by Beneficial to Irving Trust Company, as Agent under said Agreement made as of November 9, 1960, such moneys shall be held in Cash Collateral Accounts as security for the Institution Indebtedness and such other obligations as provided in said Agreement made as of November 9, 1960 and disposed of as provided therein.

2. We hereby agree and confirm that any and all assignments of notes made pursuant to the Master Agreement shall be deemed to be and shall be assignments for the purpose of securing payment of the Institution Indebtedness and certain obligations of the undersigned as set forth in and contemplated by said Agreement made as of November 9, 1960, all as if such assignments contained express provisions to such effect, subject to the rights of Beneficial under the Master Agreement.

3. You and we hereby confirm that the Master Agreement constitutes an agreement for servicing the collection of the notes by Beneficial and a security device for the benefit of the Institutions and certain other creditors of the undersigned as aforesaid supplementing the provisions of aforesaid Agreement made as of November 9, 1960 and all assignments heretofore executed and delivered by

the undersigned for such purpose, and, notwithstanding anything herein or in the Master Agreement to the contrary, does not constitute a loan by, or other disposition of the notes to, Beneficial. We will make no changes in the Master Agreement without first consulting you and obtaining your prior written consent.

4. You hereby consent, as Majority Holders under said Agreement made as of November 9, 1960, to our entering into the Master Agreement and to the performance by us of our obligations thereunder, and, without limiting the generality of the foregoing, you hereby authorize and direct Industrial National Bank of Miami, Custodian under said Agreement made as of November 9, 1960, to deliver to Beneficial any and all notes of the undersigned held by said Custodian.

5. (a) This agreement, the Master Agreement, and Agreement No. 1 dated January 27, 1961 between the Majority Holders and Beneficial shall constitute a supplement within the terms and provisions of the Agreement made as of November 9, 1960, with Beneficial being hereby substituted for the Custodian with respect to the notes delivered to it and also for the banks of deposit.

(b) Unless otherwise directed by you, promptly upon receipt by us, all proceeds from the sale of repossessed or returned merchandise covered by notes which are the subject of the Master Agreement, including proceeds from cash sales, down payments and the notes from installment sales, shall be turned over in the identical form received by us to Beneficial for the account of the Institutions and all such proceeds shall be paid by Beneficial to Irving Trust Company, as Agent as aforesaid. All proceeds

from trade-ins shall be similarly treated. In such connection, we will give Beneficial all necessary instructions and directions.

(c) Nothing herein contained shall impair or adversely affect any of the rights of the Institutions or the Majority Holders under the Agreement made as of November 9, 1960 or with respect to any assignments referred to therein or contemplated thereunder and the Agreement made as of November 9, 1960 shall in all respects remain in full force and effect.

6. In accordance with the terms of the telegraphic amendment to the Agreement made as of November 9, 1960, the amount of indebtedness owing to the Institutions listed below is hereby fixed as follows in lieu of the amounts appearing in Exhibit A to said Agreemnt made as of November 9, 1960:

Name of Institution	Principal Amount of Indebtedness
First National Bank and Trust Company of Tulsa	$80,000.00
State Bank and Trust Company of Wellston, St. Louis	79,100.00
Citizens National Bank of Lubbock, Texas	78,760.90

The indebtedness owing to The Chase Manhattan Bank, Santurce, Puerto Rico and Banco Popular de Puerto Rico, Ponce, Puerto Rico, is guaranteed by Atlas Sewing Centers, Inc.; accordingly, the amount of such indebtedness owing to said banks shall, notwithstanding the fact that said banks are not parties to the Agreement made as of

November 9, 1960, continue to constitute Institution Indebtedness, but distribution and allocation of payments in respect of such amounts owing to said banks shall be determined by agreemnt between the Majority Holders and said banks. To give effect to the foregoing, the Collateral Note, to be delivered as provided in the Agreement made as of November 9, 1960, is hereby fixed at $13,477,860.90.

7. We acknowledge the receipt of Agreement No. 1 between Beneficial and the Majority Holders and agree to comply with all terms thereof in so far as they relate to us.

8. This agreement may be executed in counterparts.

ATLAS SEWING CENTERS, INC.

By _____
President

Each of the Subsidiaries of Atlas Sewing Centers, Inc. listed in Exhibit A attached hereto.

By _____
President of Each Subsidiary

ACCEPTED:

Majority Holders under Agreement Made as of November 9, 1960, as amended:

THE CLEVELAND TRUST COMPANY

By _____

EMPIRE TRUST COMPANY
By _____

FIRST WESTERN BANK & TRUST COMPANY
By _____

IRVING TRUST COMPANY
By _____

JEFFERSON STANDARD LIFE INSURANCE COMPANY
By _____

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY
By _____

TEXAS NATIONAL BANK OF HOUSTON
By _____

Name of Subsidiary

Atlas Sewing Centers, Inc. of Alabama
Atlas Sewing Centers, Inc. of Arizona
Atlas Sewing Centers, Inc. of Baltimore
Atlas Sewing Centers, Inc. of Biloxi
Atlas Sewing Centers, Inc. of Cleveland
Atlas Sewing Centers, Inc. of Colorado
Atlas Sewing Centers, Inc. of Columbus
Atlas Sewing Centers, Inc. of Corpus Christi
Atlas Sewing Centers, Inc. of Dallas
Atlas Sewing Centers, Inc. of Denver
Atlas Sewing Centers, Inc. of Fort Worth
Atlas Sewing Centers, Inc. of Georgia
Atlas Sewing Centers, Inc. of Hawaii

Atlas Sewing Centers, Inc. of Indiana
Atlas Sewing Centers, Inc. of Indianapolis
Atlas Sewing Centers, Inc. of Jackson
Atlas Sewing Centers, Inc. of Jacksonville
Atlas Sewing Centers, Inc. of Kansas City
Atlas Sewing Centers, Inc. of Kentucky
Atlas Sewing Centers, Inc. of Memphis
Atlas Sewing Centers, Inc. of Miami
Atlas Sewing Centers, Inc. of Minneapolis
Atlas Sewing Centers, Inc. of Mobile
Atlas Sewing Centers, Inc. of Nebraska
Atlas Sewing Centers, Inc. of New Jersey
Atlas Sewing Centers, Inc. of New Mexico
Atlas Sewing Centers, Inc. of Norfolk
Atlas Sewing Centers, Inc. of North Carolina
Atlas Sewing Centers, Inc. of Oklahoma
Atlas Sewing Centers, Inc. of Oregon
Atlas Sewing Centers, Inc. of Pensacola
Atlas Sewing Centers, Inc. of Philadelphia
Atlas Sewing Centers, Inc. of Pittsburgh
Atlas Sewing Centers, Inc. of Richmond
Atlas Sewing Centers, Inc. of San Antonio
Atlas Sewing Centers, Inc. of South Carolina
Atlas Sewing Centers, Inc. of St. Louis
Atlas Sewing Centers, Inc. of Tennessee
Atlas Sewing Centers, Inc. of Texas
Atlas Sewing Centers, Inc. of Utah
Atlas Sewing Centers, Inc. of Virginia
Atlas Sewing Centers, Inc. of Washington, D. C.
Atlas Sewing Centers of New Orleans, Inc.
Atlas Stores, Inc. of California
Atlas Stores, Inc. of San Diego
Atlas Stores, Inc. of San Francisco
Atlas Stores, Inc. of San Jose

APPENDIX F

AGREEMENT No. 1

between

BENEFICIAL FINANCE CO. OF NORTH JERSEY

and

MAJORITY HOLDERS

January 27, 1961

TO: Beneficial Finance Co. of North Jersey
200 South Street
Morristown, New Jersey

Reference is hereby made to the proposed form of Master Agreement No. 1 dated January 27, 1961, between you on the one part and Atlas Sewing Centers, Inc., and certain of its subsidiaries on the other part. In order to induce you to enter into such Master Agreement and to make and cause your affiliated corporations and associated companies to make purchases of notes as contemplated therein, the Majority Holders as set forth in the Agreement made as of November 9, 1960, as amended, heretofore delivered to you, and pursuant to the authority granted to them therein and for the benefit of the Institutions as therein defined, do hereby:

1. Consent to Atlas Sewing Centers, Inc. and its subsidiaries entering into such Master Agreement with you and consent to all assignments made pursuant to such Master Agreement, to you or any of your affiliated corporations or associated com-

panies (reference to you herein shall include all such corporations and companies);

2. Agree to hold all moneys paid to Irving Trust Company, as Agent, pursuant to the provisions of Paragraph 7 of said Master Agreement to the extent necessary to make any repayments to you required thereunder, and agree to use such funds to make any such payments so required; and

3. Authorize and direct Industrial National Bank of Miami, Custodian under said Agreement made as of November 9, 1960, as amended, to deliver to you any and all notes received from Atlas Sewing Centers, Inc. and its subsidiaries named in Exhibit B to said Master Agreement.

In consideration of the foregoing you agree to the following:

1. You will not make any changes in said Master Agreemnt without the consent of said Majority Holders or their agent;

2. Subject to your paramount right, title and interest in the notes as provided in said Master Agreement, the rights of the Institutions as provided in the aforesaid Agreement made as of November 9, 1960, as amended, and in any assignments made pursuant thereto, or otherwise, in and to the notes, the property covered thereby and the proceeds therefrom, are hereby expressly preserved and maintained; and

3. No disposition shall be made by you of any personal property repossessed or returned except with the consent of the Majority Holders or their agent.

This agreement may be executed in counterparts.

If the foregoing is acceptable to you, please indicate your assent thereto by signing below.

Majority Holders under Agreement made as of November 9, 1960, as amended:

THE CLEVELAND TRUST COMPANY
By _____

EMPIRE TRUST COMPANY
By _____

FIRST WESTERN BANK & TRUST COMPANY
By _____

IRVING TRUST COMPANY
By _____

JEFFERSON STANDARD LIFE INSURANCE COMPANY
By _____

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY
By _____

TEXAS NATIONAL BANK OF HOUSTON

By _____

Accepted: January 27, 1961

BENEFICIAL FINANCE CO. OF NORTH JERSEY

By _____